Supreme Court, U. S.
FILED
FEB 12 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1248

STATE OF MISSOURI,
Petitioner,

vs.

VINCENT WANDIX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM A FINAL JUDGMENT ENTERED BY THE MISSOURI SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI FROM A FINAL JUDGMENT ENTERED BY THE MISSOURI SUPREME COURT

The State of Missouri, petitioner herein, by its Attorney General John Ashcroft, respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Missouri Supreme Court entered on October 19, 1979. The State of Missouri's Motion for Rehearing was overruled by the Missouri Supreme Court on November 14, 1979.

REPORTS OF OPINIONS BELOW

On March 16, 1976, an indictment was filed charging Wandix with unlawfully and feloniously selling heroin on July 23, 1975. After two mistrials Wandix was convicted on April 13, 1977, of the sale of heroin. The jury fixed his punishment at fifteen (15) years; the trial court reduced that sentence to ten (10) years.

An appeal was taken to the Missouri Court of Appeals, Eastern District. That Court issued an unpublished opinion affirming the judgment and conviction. Appendix A. Pursuant to Wandix's Motion the case was transferred to the Missouri Supreme Court on February 13, 1979. On October 19, 1979, that Court reversed the conviction and remanded the case for a new trial. *State v. Wandix,* 590 S.W.2d 82 (Mo. banc 1979); and, Appendix B. The State filed a Motion for Rehearing on November 2, 1979. Appendix C. This Motion was overruled in a *per curiam* opinion filed November 14, 1979. Appendix D.

JURISDICTIONAL STATEMENT

Title 28 U.S.C. § 1257 states, in pertinent part, that final judgments or decrees rendered by the highest court of a State may be reviewed

> "[b]y writ of certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of . . . the United States."

This Court's Rule 19 also provides for review by certiorari:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In this case a confidential informant introduced an undercover agent to Wandix who agreed to sell heroin to the agent. Since the informant was no more than a minor participant in the drug transaction, and the evidence indicated that he was not even present when the sale took place, the trial court refused Wandix's request for disclosure of the informant's identity. The Missouri Supreme

Court reversed the conviction concluding that disclosure was mandated. The Missouri Supreme Court remanded the case for retrial based solely upon its reading of *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The State of Missouri asserts that the facts in this case are wholly dissimilar to those in *Roviaro.* Consequently, the State urges that this Court issue the Writ because the Missouri Supreme Court has improperly extended, far beyond its intendment and scope, the rule of disclosure found in *Roviaro.* To use the language of Rule 19, the State urges that the Writ issue to the Missouri Supreme Court because it required the disclosure of a confidential informant in a way which is probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

Wandix was introduced to an undercover agent, by an informant, shortly before Wandix sold heroin to the agent. The Missouri Supreme Court held that the informant's identity had to be disclosed, despite his minor role in the affair, because Wandix relied upon the defense of mistaken identity. Based solely on *Roviaro* the Missouri Supreme Court concluded that the failure of the trial court to order disclosure violated Wandix's federal constitutional right to a fair trial.

Consequently, the question here presented is whether the Missouri Supreme Court misinterpreted *Roviaro* and thereby improperly expanded and enlarged upon a criminal defendant's right to the identity of an informant tangentially involved in a criminal transaction.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

"Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

On March 16, 1976, an indictment was filed charging Wandix with unlawfully and feloniously selling heroin on July 23, 1975 (Tr. 1-2). Wandix was convicted of the sale of heroin on April 13, 1977, and sentenced to a term of fifteen (15) years imprisonment (Tr. 260). The trial court thereafter reduced the sentence to ten (10) years (Tr. 273).

Officer Leeman Dobbins was, on the date in question, employed by the St. Louis Police Department and assigned to the Narcotics Division (Tr. 21). On July 23, 1975, at about 5:30 p.m., he, along with Detective Leon Bates and an "unidentified individual," went to a residence located in the Beechum Park area (Tr. 21-23). At a Beechum Park residence, as previously arranged, the "unidentified individual" introduced Officer Dobbins to Wandix (Tr. 24). After arrangements were made Officer Dobbins followed Wandix to 942 South Taylor (Tr. 24-25). Prior to arriving at 942 South Taylor Officer Dobbins dropped Detective Bates off at the corner (Tr. 25).

Officer Dobbins arrived at 942 South Taylor residence at approximately 6:20 p.m. and followed Wandix inside (Tr. 26). Once inside Wandix asked Officer Dobbins what he wanted, to which Dobbins replied that he wanted two capsules of heroin (Tr. 26-27). Wandix said "okay," left the presence of Officer Dobbins, walked down the hallway and returned a minute or two later (Tr. 27). Upon his return Wandix produced a container holding 20 to 30 capsules from which he removed two (Tr. 27). Wandix then handed Dobbins two capsules in return for which he received a twenty dollar bill (Tr. 28).

It was agreed at trial that the capsules contained heroin (Tr. 28, 143-144, 145, 253). Officer Dobbins spoke

briefly with Wandix after the sale, at which time he was told that he could come back and purchase more heroin if he so desired (Tr. 29).

Officer Dobbins left the residence, picked up his partner Detective Bates, and went to a parking lot where he met another police officer (Tr. 30). At the close of the direct examination of Officer Dobbins he stated that he was aware of no one else who was present in the 942 South Taylor residence at the time the heroin transaction occurred (Tr. 31).

On cross-examination Mr. Schwartz, Wandix's attorney, asked Officer Dobbins to disclose the identity of the informant who introduced him to Wandix (Tr. 32). The State objected on the ground that Wandix did not have a right to the identity of the informant because "[t]he informant was not present for the sale. . . . And I don't believe he has any bearing on the guilt or innocence in this matter. . . ." (Tr. 32-33). Mr. Schwartz asserted that the informant was a material witness because ". . . he is some kind of a participant in this incident. It may be he instigated this incident and if he did he is not a confidential informant of [sic] Missouri law and he is a necessary and material witness." (Tr. 33).

At this juncture the State, Mr. Schwartz, and the trial judge discussed the matter of disclosure in the judge's chambers (Tr. 35). There it was established that the informant did not enter the South Taylor residence with Officer Dobbins (Tr. 43). Mr. Schwartz questioned Officer Dobbins extensively in the judge's chambers, mostly in regard to whether the informant was reliable (Tr. 35-49). Upon finishing his questioning of Officer Dobbins, Mr. Schwartz made an oral motion requesting the State disclose the name of the informant, and his address, "for the reason that I don't think he qualified as [the prose-

cutor] would have the Court, or ask the Court to believe as being a confidential informant" (Tr. 49). Mr. Schwartz further requested that the informant's identity be disclosed because "he is the only lay-witness to this case . . ." (Tr. 50). Mr. Schwartz stated that the case involved an alibi defense and that the informant is "the only lay-witness who can contradict, dispel, or prove the issues that are in controversy except the government witnesses. . . ." (Tr. 50). Mr. Schwartz closed his oral motion by requesting the disclosure of the identity of the informant "—if it would help this defendant, and help Mr. Wandix in counteracting any of the evidence in this case" (Tr. 50). The Court overruled the motion to disclose (Tr. 50).

Upon the parties' return to open court Officer Dobbins testified that the plan was that he be introduced to somebody by the name of "Wandix" by an informant so that a drug deal could be consummated (Tr. 67-68).

The second witness to testify for the State was Officer Leon Bates. He was employed for seven years by the St. Louis Police Department and on July 23, 1975, was assigned to the Narcotics Division (Tr. 78). On that date Bates accompanied Dobbins to the Beechum Park area residence where he saw the latter conversing with Wandix (Tr. 80). Officer Bates also saw Wandix pull into a driveway at the South Taylor residence and enter that residence with Dobbins (Tr. 82). Bates himself did not enter the South Taylor residence (Tr. 91, 100).

The third witness to testify for the State was Officer Michael McDonald. At the time of trial he was a detective with the St. Louis Police Department, and had so been for four years (Tr. 111). At about 6:30 p.m. on July 23, 1975, McDonald received two red capsules from Dobbins after the latter purchased them at the South Taylor residence from Wandix (Tr. 114-115).

On cross-examination Mr. Schwartz asked McDonald the name of the informant; this question initiated a second hearing in the judge's chambers (Tr. 116). In chambers McDonald stated that on July 23, 1975, he came to work in the evening at which time he was told that he was going to "surveil" two City detectives on a deal; this deal was set up prior to his coming to work (Tr. 117-118). At that point in time McDonald had no previous contact with the informant (Tr. 118). However, McDonald had numerous subsequent contacts with the informant (Tr. 119). The subsequent numerous occasions involved either the sale or possession of controlled substances (Tr. 119). The informant supplied information to McDonald for six to eight months subsequent to July 23, 1975 (Tr. 119). From these experiences McDonald found that the informant was reliable (Tr. 120).

Thereafter, the trial court overruled, for a second time, Wandix's request that the informant's identity be disclosed (Tr. 127).

The Missouri Court of Appeals, Eastern District, affirmed the conviction in an Opinion filed on November 21, 1978. Appendix A. Therein, the Eastern District agreed with the State that the disclosure issue was not preserved for review because it was not made with specificity at trial.

> "We hold [Wandix] did not preserve the point for review, either at trial or in his after-trial motion. In both, [Wandix] contended his right to disclosure was based on his unfounded assertions the informant was an instigator of and participant in the sale. At no time did [Wandix] contend, as he does for the first time on appeal, that disclosure was warranted because 'identity is a crucial issue in this case.' "

Nevertheless, the Eastern District reviewed the point on its merits and concluded that disclosure was not mandated because the facts in the case clearly indicated that the informant was merely that, and his minor participation in the crime and his failure to witness the actual transaction supported the trial court's ruling.

The case was transferred to the Missouri Supreme Court which reversed the conviction. First, the Court found that the question was preserved for review because "the parties recognized that identity was a crucial issue in the case." *State v. Wandix,* 590 S.W.2d 82, 84 (Mo. banc 1979). The Court also found that the issue of disclosure was properly before them regardless of the fact that Wandix's Motion for Disclosure was untimely filed in the trial court. *Id.*, 509 S.W.2d at 84.

Second, the Court went on to discuss the merits of the disclosure issue. In determining that the trial court erred in failing to require disclosure, the Missouri Supreme Court relied solely upon *Roviaro*. Indeed, in its *per curiam* statement overruling the State's Motion for Rehearing the Missouri Supreme Court stated that it did not presume to declare new law, that its Opinion represented, at most, "an application of the *Roviaro* balancing test . . . ." *Id.*, 590 S.W.2d at 93.

The Missouri Supreme Court found irrelevant "[w]hether the informant actually entered the house . . . ." *Id.*, 590 S.W.2d at 86. Rather, the Court found that *Roviaro* mandated disclosure because the informant introduced an undercover agent to Wandix shortly before the drug sale, and Wandix relied upon a defense of mistaken identity at trial. Thus, the Court found that the State's need to maintain the confidentiality of its informant was minimal—because the informant was no longer active at the time of the trial—and "the informant could provide relevant testimony at trial." *Id.*, 590 S.W.2d at 86.

ARGUMENT

In *State v. Wandix, supra,* the Missouri Supreme Court decided a question of significant federal constitutional magnitude. In essence, the Missouri Supreme Court concluded that federal constitutional law, as enunciated by this Court in *Roviaro*, mandated the disclosure of a confidential informant whenever a defendant claimed the defense of mistaken identity even though the informant's part in the criminal transaction may have been minimal.

The State contends that the perimeters of the informer privilege are a matter of federal constitutional law defined by this Court in *Roviaro.* The State further contends that the Missouri Supreme Court, in *State v. Wandix,* unlawfully expanded upon a defendant's right to the identity of an informant, to the detriment not only of the State of Missouri but to the interests of every system designed to serve the ends of criminal justice, and that therefore the decision of the Missouri Supreme Court must be reversed.

Roviaro came to this Court on a writ of ceriorari

> "[i]n order to pass upon the propriety of the nondisclosure of the informer's identity and to consider an alleged conflict with Portomene v. United States (C.A. 5th Fla.) 221 F.2d 582; United States v. Conforti (C.A. 7th Ill.) 200 F.2d 365; and Sorrentino v. United States (C.A. 9th Cal.) 163 F.2d 627."

Roviaro was convicted on a two-count indictment, one count charging that on a given date he sold heroin to one "Joe Doe" and the second alleging that at the same time he

> ". . . did then and there fraudulently and knowingly receive, conceal, buy and facilitate the trans-

portation and concealment of . . . heroin, knowing the same to be imported into the United States contrary to law . . . ."

The evidence as to the factual circumstances underlying the conviction established that Roviaro sold heroin directly to the informant, and that there were *no* other participants in the transaction. Despite this fact, and in spite of a provision of 21 U.S.C. § 174, shifting to Roviaro the burden of going forward with evidence as to his own defense, the District Court refused to compel disclosure of the identity of "Joe Doe". The decision was affirmed by the Court of Appeals.

Roviaro reached this Court for consideration in light of three prior federal decisions—each of which presented a situation strinkingly similar to it. In *Sorrentino, supra,* a government informer arranged and participated in the transfer of opium without any other witness to the transaction. Affirming the decision of the lower court, on other grounds, the Ninth Circuit noted:

> ". . . If the person . . . had been an informer and nothing more, appellant would not have been entitled to have his identity disclosed; but the person . . . called an informer was something more. He was the person to whom appellant was said to have sold and dispensed the opium described in the indictment. Information as to the person's identity was . . . material to appellant's defense, and appellant was entitled to a disclosure thereof." 163 F.2d at 628.

Portomene, supra, also involved the sale of illegal drugs to an informer. Relying upon *Sorrentino* the Fifth Circuit held the District Court's refusal to compel disclosure of the informer's identity was fatal to the conviction distinguishing the informer who

> ". . . is that and nothing more, in which case the defendant would not have been entitled to have his identity disclosed, and a case such as this one, where the informer is the person to whom the defendant is said to have sold and dispensed the opium described in the indictment. In such case information as to this person's identity was material to the defense and the denial of the required information was error." 221 F.2d at 583.

In *Conforti, supra,* the Seventh Circuit stated that because an informant was the recipient of counterfeit notes, the defendant who had allegedly delivered the note *would* have had the right to compel disclosure of the informant's identity, had a proper demand been made at trial.

Therefore, this Court in *Roviaro* was presented with the question of whether the petitioner's conviction could stand in light of prior holdings on the informer privilege. This Court held that it could not. Preliminarily, the basis of the privilege was explained as follows:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is a furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials, and, by preserving their anonymity, encourages them to perform that obligation." 353 U.S. at 60, 1 L.Ed.2d at 644.

The principal accomplishment of this Court in *Roviaro,* however, lay not in the definition of the privilege, but

rather in its limitation. Allowing, first, that disclosure might be compelled where the identity is already known to persons who might have adverse interests, Justice Burton turned to a more fundamental limitation:

> ". . . Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61, 1 L.Ed.2d at 645.

The definition of "relevant and helpful" is not absolute:

> ". . . Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is an issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." 353 U.S. at 61, 1 L.Ed.2d at 645.

The test is one that calls for a balancing of the public interest in protecting the flow of information, as opposed to the individual's right to prepare for his defense. In overturning Roviaro's conviction this Court asserted that the identity of an informant who is *only* an informant is not subject to disclosure.

The State of Missouri notes that *Roviaro's* limitation has always been recognized, up until the Missouri Supreme Court's decision in *Wandix*. Indeed, the *Wandix* decision was by the narrowest of margins: the vote was four to three in favor of reversal.

It is interesting to compare the majority Opinion in *Wandix* to that of the dissent. The majority concluded that reversal was mandated because the trial court erred

by failing to require disclosure of the informant's identity. The majority buttressed its conclusion by relying solely upon this Court's decision in *Roviaro*. Nevertheless, the *Wandix* majority failed to discuss the plethora of opinions construing *Roviaro*. Those cases, cited by the dissent, recognized that *Roviaro* mandated disclosure only in cases where the informant either witnessed the transaction or was a major participant. The dissent pointed out, time after time, that the factual situation in *Wandix* was strikingly similar to those cases where disclosure was held not to be warranted. The dissent established the striking factual dissimilarity between *Wandix* and *Roviaro*. The dissent relied upon numerous state and federal cases which supported affirmance of Wandix's conviction because the informant neither dealt directly with Wandix nor was a significant participant in the criminal offense. As stated by the dissent:

> "Here, the majority with little mention of the *Roviaro* facts has seized upon a part of the general language in the decision and carried it beyond the contextual limits of the case. It would permit a defendant in any case when an informant was a mere bystander or observer to make the vague conclusory allegation that the informant, who observed facts preliminary to an actual sale of narcotics, might be of help and on such a general allegation disclosure would be required. This it does without requiring that 1) defendant first show the reasonable likelihood that informant's testimony would be of reasonable benefit to him, or 2) there be a showing, as in *Roviaro* that he participated in the commission of the crime.
>
> "In short, the mischief resulting from the majority's opinion which unreasonably extrapolates the general language of *Roviaro* would effectively destroy

the privilege of the confidential informer in drug cases and required disclosure on the basis of mere speculation that an informant might be able to help the defendant in some way by 'amplifying of denying testimony of the police officer. This would be so, where as here, an informant gives information and merely leads the police officers to a place where the drug peddler is conducting his business. Such was not the intent of *Roviaro* and constituted an unwarranted extension of the holding of that case which can only lead to stultification of our law enforcement system by effectively removing one of the state's most valuable enforcement tools, the confidential informant. This radical departure should not be adopted as the law in Missouri and indeed in McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), the Supreme Court reexamining *Roviaro* ten years later made clear that it should not be read broadly to require disclosure of an informant's identity in various procedural stages of criminal prosecutions, that there is no justification for a fixed rule with respect to disclosure and reiterated that in *Roviaro* the informer 'was the sole participant, other than the accused.' *Id.*, at 310, 311, 87 S.Ct. 1062. The *McCray* Court reemphasized that a most important consideration before disclosure would be required was 'the possible significance of the informer's testimony.' *Id.* Stated otherwise, the trial court need not blindly accept defendant's assertion that the informant's testimony would be helpful. Instead, it must first determine the reasonable likelihood of such 'helpful testimony' and thereafter weigh such 'fact' in the balance.

"Numerous courts have applied the *Roviaro* balancing test to the disclosure issue and have held that the name of an informant, though a minor participant

in a criminal transaction and an eye-witness to the transaction in question, need not be disclosed. As hereinabove noted there is some question in the evidence whether informant was present when the transaction occurred, but the more plausible testimony demonstrated he was not and that his observations included only the parties' preliminary meeting.

* * *

"Certainly, in this case where it is shown that the informant merely introduced Wandix to the officer and followed him to the house (or may have entered) in which the crime was committed, the trial court did not abuse its discretion in denying the motion for disclosure. In State v. Milligan, 71 N.J. 373, 365 A.2d 914 (N.J. 1976), the New Jersey Supreme Court recently dealt with the disclosure issue under facts nearly identical to ours. An informant accompanied a police officer to a street corner location where he introduced the officer to defendant and observed as the sale was arranged. Subsequently all three drove to the defendant's house and while the informer was out of the room, the sale was made. The New Jersey Supreme Court concluded that given the informer's limited involvement in the crime and the speculative significance of the testimony, the defendant did not demonstrate that his interests outweighed the state's interest in nondisclosure. There as here, the informant's role was minor and the significance of his possible testimony a matter of conjecture.

* * *

"It is generally recognized that defendant has a significant burden of proving that the disclosure of a confidential informant is necessary for a fair determination of defendant's case and that the need outweighs the government's interest. Mere speculation

> on the defendant's part that the testimony of the confidential informant will be helpful is not enough. [Citations omitted]. In the case at bar, defendant has offered only his conclusory assertion (belatedly made by his oral motion during trial) that the informant's testimony might be helpful. This may legitimately be characterized as speculation and conjecture hardly sufficient to meet the significant burden described in the flood of cases interpreting *Roviaro.*" 590 S.W.2d at 90-92.

Interestingly, the Missouri Supreme Court did not discuss, in its majority opinion, the speculative nature of Wandix's request for disclosure. The Missouri Supreme Court ignored the fact that by his own admission Wandix's trial counsel had tried the case at least twice previously. Certainly, Mr. Schwartz knew the facts of the case inside and out and the fact that he failed to sustain his burden and establish that the informant had testimony beneficial to Wandix is enough to support the trial court's decision not to require disclosure.

Simply stated, this Court's decision in *Roviaro* states, and has been interpreted to state, that disclosure is required only when the informant was a major participant, or the only other participant in the drug transaction and had information beneficial to the defendant. The majority opinion of the Missouri Supreme Court has twisted *Roviaro* inside out. The Missouri Supreme Court ignored the fact that Wandix's Motion for Disclosure was based upon speculation and conjecture and that Wandix never came close to sustaining his burden of establishing the likelihood that the informant had beneficial testimony. Furthermore, the Missouri Supreme Court blithely ignored the teaching of *Roviaro,* and its progeny, that before disclosure is mandated an informant must participate in a major way in the transaction sought to be charged against the defendant. The majority opinion of the Missouri Supreme Court stated that it was irrelevant whether the informant witnessed the drug transaction; the Court was satisfied that the informant had introduced undercover agents to Wandix shortly before the sale. This, however, is not enough and the overwhelming number of cases construing *Roviaro,* and *Roviaro* itself, so state.

Finally, the majority opinion of the Missouri Supreme Court found the State's interest in preventing disclosure weak simply because the informant was no longer active. It must be pointed out that this Court in *Roviaro* never said anything about the activity, *vel non* of an informant. Obviously, whether an informant is still active at the time of trial is only tangential to an ascertainment of the State's interest in preventing disclosure. Other issues which need to be considered are: 1) whether the informant is an active and participating member in the community and thus his well-being substantially endangered if his identity is disclosed; 2) whether the informant has taken only a brief hiatus from his work with the police department and disclosure will deter his efforts to curtail lawlessness in the future; and, 3) whether the community as a whole will be detrimentally affected and persuaded not to report lawlessness if it observes that once an informant disengages himself from that activity he is subject to having his "cover blown" and his life endangered.

The balancing test that this Court set out in *Roviaro* is far more complex than the Missouri Supreme Court makes it out to be.

The Missouri Supreme Court, in fact, did no balancing whatsoever. It simply concluded, based upon *Roviaro,* and no other authority, that the introduction of Wandix to undercover agents by the informant shortly before the drug sale was sufficient to require disclosure since Wandix

was relying upon a defense of mistaken identity. This is not what *Roviaro* said. It is the State's opinion that the Missouri Supreme Court illegally expanded upon *Roviaro*. This Court has stated that when it sets the bounds of a defendant's federal constitutional rights, vis-a-vis a state, no state court may expand or restrict that right. *Oregon v. Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 576 (1975).

The State of Missouri believes that the Missouri Supreme Court's unwarranted and unsupported expansion of the rule of law stated in *Roviaro* is an illegal usurpation of the authority and power vested solely in this Court. Consequently, it is urged that this Court issue a writ of certiorari to the Missouri Supreme Court and, upon review, affirm the conviction of Wandix.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted and the judgment and decision of the Missouri Supreme Court reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
DIVISION III

No. 39,479

STATE OF MISSOURI,
Respondent,

v.

VINCENT WANDIX,
Appellant.

Appeal from the Circuit Court
County of St. Louis
Harry J. Stussie, Judge

OPINION FILED

November 21, 1978

A jury found defendant guilty of feloniously selling heroin (§195.020, RSMo. 1969), and he has appealed the judgment imposing ten years' imprisonment. Defendant's sole point on appeal is that the trial court erred in refusing to compel the state to disclose the name of a confidential informant. Defendant did not testify but relied on alibi evidence and now contends his own identity was an issue, as to which the informant was a material witness. For the state, an out-of-uniform police officer testified that an informant, whom he did not name, had introduced him to defendant who later sold him two capsules of heroin.

We affirm, concluding the trial court's refusal to compel disclosure was discretionary and not erroneous because

defendant's present contention as to his identity as the seller was not specifically raised below.

The state's principal witness was police officer Leeman Dobbins who testified he and another undercover officer, Leon Bates, met defendant at a park and then went to defendant's residence; while Bates waited outside Dobbins went into the house with defendant, who then sold him two capsules of heroin. Dobbins testified on cross examination that he and Bates were accompanied from the park to defendant's house by an unnamed person whom defense counsel wanted him to name. In chambers, Dobbins testified the unnamed person was a "confidential informant" who had introduced him to defendant at the park; that the informant had followed him to but did not enter defendant's residence. The court denied defense counsel's oral motion to compel disclosure of the informant's name. This ruling is the first basis of defendant's appellate argument that he was entitled to disclosure of the informant's name—on the issue of defendant's identity as the seller.

The state's second witness was Officer Bates, whose testimony did not fully track that of Dobbins. He testified that from some distance away he witnessed Dobbins' and defendant's initial conversation at the park; that he followed in another car to a point "down the street" from defendant's residence and saw not only Dobbins and defendant but also the "unidentified person" enter defendant's house.

After still another state's witness had testified, defendant made, and the trial court denied, his second motion to compel the state to disclose the name of the unidentified informant.

As contended by the state, we conclude the trial court did not err in denying either the first or the second motion to compel the state to identify the informant.

The first motion to disclose was made orally at the close of Officer Dobbins' cross examination wherein he had testified the unidentified informer had merely introduced him to the defendant and was not present in defendant's house at the time of sale. Defense counsel then sought the informer's identity because ". . . he is some kind of a participant in the incident; it may be he instigated this incident . . . ." Defense counsel made no trial contention, as he does now, that defendant's identity was at issue. Aside from the vagueness of defendant's motion we find no error. Where an informer neither participates in nor observes an unlawful purchase, where he merely introduces the defendant to an officer who later makes the purchase, the informer is nothing more than an informer and disclosure of his identity is not required. State v. Tilcock, 522 SW2d 60 [3, 4] (Mo.App. 1975).

The point made at trial was so vague it preserved nothing for review, and, further, it was without merit for the reason stated.

A similar issue arises from defendant's second motion to disclose the informer's identity, made after Officer Bates had testified that from afar he had seen the informer enter defendant's house with Officer Dobbins. (This did not, however, contradict Officer Dobbins' testimony that no one else was present at the drug transaction.) Defendant on appeal—for the first time—contends the informer's identity was material since only he could contradict Officer Dobbins in naming defendant as the seller.

We hold defendant did not preserve the point for review, either at trial or in his after-trial motion. In both,

defendant contended his right to disclosure was based on his unfounded assertions the informer was an instigator of and participant in the sale. At no time did defendant contend, as he does for the first time on appeal, that disclosure was warranted because "identity is a crucial issue in the case."

The state's contention that defendant has not preserved his point for review is squarely supported by State v. Thompkins, 515 SW2d 808 [6] (Mo.App. 1974) holding:

> "In view of the 'particular circumstances' of this case in the respects heretofore pointed out, this court is unwilling to say that the trial court, tested by 'fundamental requirements of fairness,' committed error in not compelling the state to reveal the informant's identity, particularly so since appellant at no time informed the trial court that doing so would, or might possibly, refute the police officer's identity of appellant as the person making the illegal sale, as now contended for the first time on appeal. . . . This court has no inclination to brand a trial court guilty of error in refusing to strip an informant of his anonymity when the facts and the arguments bearing on the proposition are not made and argued to it at the times it is called upon to rule on the claimed error, and, more particularly, where, as here, the basis allegedly supporting the charge belatedly emerges for the first time as an afterthought on appeal."

To the same effect concerning a defendant's identity, see State v. Hubbel, 494 SW2d 358 [5] (Mo.App. 1973).

We hold defendant has not shown the trial court erred in failure to compel disclosure.

On our own motion, we have considered whether the trial court's rulings deprived defendant of a fair trial.

Whether the state should have been compelled to disclose the name of the confidential informant rested initially in the trial court's discretion. State v. Redding, 357 SW2d 103 [7, 8] (Mo. 1962). This depends on whether disclosure of the identity of a non-participating informant is essential to the determination of a material issue. As a general rule communications made by informers to governmental officials are privileged. This is founded upon public policy—public interest in effective law enforcement. By preserving their anonymity, citizens are encouraged to communicate to law enforcement officers their knowledge of the commission of crimes. The privilege is designed not for the protection of the informer but for the protection of the public interests. State v. Edwards, 317 SW2d 441 [5, 6] (Mo. 1958). The issue of mandatory disclosure was fully discussed in State v. Yates, 442 SW2d 21 [4-12] (Mo. 1969). There an unidentified informant led police to the place of a narcotics sale and, unlike our case, actually observed the sale. Despite this, the court upheld the trial court's refusal to compel disclosure of the informant, holding:

> "Whether the defendant can have a fair trial without requiring disclosure is a matter resting within the discretion of the trial court. State v. Redding, Mo. Sup., 357 SW2d 103[7]. In balancing the interest of the individual in the proper preparation of his defense against the interest of the public in promoting the flow of information so as to protect society against the criminal element each case must stand on its own bottom, and under the facts of the particular case consideration must be given to 'the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors.' . . .

"The mere physical presence of the informer at the scene of the crime is not sufficient to conclusively establish that a defendant cannot have a fair trial without disclosure of the identity of the informer."

There, as here, the trial court did not abuse its discretion in holding defendant was not denied a fair trial by withholding the name of the unidentified informer.

Judgment affirmed.

/s/ James D. Clemens
James D. Clemens, Judge

James R. Reinhard, Presiding Judge, Concurs
George F. Gunn, Jr., Judge, Concurs

APPENDIX B

SUPREME COURT OF MISSOURI
EN BANC

No. 61201

STATE OF MISSOURI,
Respondent,

vs.

VINCENT WANDIX,
Appellant.

Appeal From the Circuit Court, St. Louis County
Division No. 2
Honorable Harry J. Stussie, Judge

(Filed October 19, 1979)

Appellant, Vincent Wandix, was convicted in the Circuit Court of St. Louis County, Missouri, of selling a controlled substance (§ 195.020, RSMo 1969), and his punishment was assessed at imprisonment for a term of ten years. Following rendition of judgment and imposition of sentence, an appeal was perfected to the Eastern District of the Court of Appeals. The case was transferred here after opinion. We decide the case the same as on original appeal. Mo. Const. Art. V, § 10.

On March 16, 1976, an indictment was filed in the Circuit Court of St. Louis County charging appellant with the sale of heroin to undercover detectives on July 23, 1975.

At trial the State introduced the testimony of officers Leeman Dobbins and Leon Bates of the St. Louis City Police Department and Officer Michael McDonald and chemist Rodger Dale Corcoran of the St. Louis County Police Department. Appellant introduced the alibi testi-

mony of Pierre and Deschiell Wandix, his brothers, and of Unis Taylor and Albert Hirsch, friends.

The testimony of the officers showed the following:

Officers Bates and Dobbins met Officer McDonald at the office of the St. Louis County Police Department in the early evening on July 23, 1975. A confidential informant was with Officer McDonald. Officer McDonald was not previously acquainted with the informant. He was passed along to him at the beginning of his shift with an assignment to survey the undercover City officers and informant as they made a drug transaction. Officer McDonald received reliable information from the informant on a substantial number of occasions subsequent to the one at issue. The informant was not previously known to Officer Dobbins or Officer Bates. Dobbins did not use the informant at any time subsequent to the incident at issue. Bates did not testify as to any subsequent use.

The officers and the informant proceeded in two cars to the Beechum Park area of the County where they were to meet a drug dealer named Vincent Wandix. Wandix was not personally known to Dobbins. Bates may have seen him before. In Beechum Park, McDonald provided loose surveillance by driving around the area. Bates was dropped off at a corner to provide close surveillance while Dobbins and the informant met Wandix. The informant introduced Dobbins to Wandix as his "partner." After a brief exchange of words, Wandix told them to follow him to a residence at 942 South Taylor.

Dobbins, the informant and Wandix proceeded to the South Taylor address in two cars. Wandix drove a Cadillac. Dobbins and the informant followed in their car. Officer Bates was picked up and again dropped off near the South Taylor address by Dobbins. After arriving at 942 South

Taylor, Dobbins entered the residence with the person identified and introduced by the informant as Wandix and purchased $20 worth of heroin from him. There is an uncertainty as to whether the informant entered the residence. Dobbins testified that he did not, that he remained in the car parked outside. Bates testified that the informant did accompany Dobbins and Wandix into the house. There is no claim or indication that anyone other than Dobbins, Wandix, and possibly the informant was in or at 942 South Taylor. The appellant was identified in court as the seller of the heroin by both Dobbins and Bates.

After completing the transaction, the officers regrouped and returned to the County Police offices where the purchased substance was turned over to the police chemist, Rodger Corcoran, and determined to be heroin.

At the close of the trial, the jury returned a verdict of guilty.

The essential issue on appeal is whether the informant's identity should have been disclosed to appellant.

Appellant contends the trial court erred in overruling his motion to disclose the confidential informant.

The State contends that appellant failed to properly raise and preserve the disclosure issue and that the trial court properly protected the identity of the informant.

The State, in its brief, presents two reasons for not reaching the merits of the disclosure issue. The first is that appellant's motion was not timely under Rule 25.31. That rule provides, in relevant part,: "* * * motions for discovery should be made not later than twenty days after arraignment in the court having jurisdiction to try the offense charged." Motions to Disclose informants should ordinarily come within the discovery time limit since Rule

25.39, enacted simultaneousiy with Rule 25.31, addresses the circumstances in which the identity of an informant is subject to disclosure. It would certainly seem desirable to make motions to disclose informants within Rule 25.31 limits, where possible, since timely motions would avoid delay, surprise and confusion.

However, the question of the timeliness of the motion is not properly raised in this case. The prosecutor did not oppose the motion on grounds of timeliness at trial. The trial judge took the motion under consideration, heard testimony on the confidential nature of the informant and the informant's relation to the transaction at issue, and specifically ruled the motion on the merits of disclosure. In these circumstances, this assertion by the State is without merit.

The second reason given by the State for not reaching the merits of the disclosure issue is that appellant failed to properly raise and preserve the issue at trial. The State contends: "The argument that identity is a crucial issue in the case and that therefore the 'unidentified individual' was a necessary and material witness for the appellant, for that reason, is advanced for the first time on appeal. For this reason this point is not preserved for review, because never presented to the trial court in the context of a mistaken identity situation."

The issue as to disclosure does not appear, from the record, to have arisen until cross-examination of Officer Dobbins. When appellant's attorney attempted to question Officer Dobbins as to the identity of the informant, the prosecutor asked to approach the bench and a conference was held. Appellant moved for disclosure. The prosecutor objected on the grounds of confidentiality. The court recessed the trial for a hearing in chambers as to the matter of the unidentified informant. After further ex-

amination of Officer Dobbins in chambers, appellant's attorney moved for disclosure: "* * * [F]or the reason that I don't think he qualifies as Mr. Nangle (the prosecutor) would have the court, or ask the court to believe as being a confidential informant. He's equally a participant in the alleged offense as any other police officer that was there. He was present when this was supposed to have taken place. He's identified my client to the Police Officer, and indicated to him that he was Vincent Wandix, and *I think that in fact he is the only other lay-witness to this case,* that would be available to either side. I don't know who he is but he is or has a part in this matter in this issue or controversy in dispute. *There is alibi defense pleadings in this case; - there are alibi defense witnesses that have been endorsed, and this unidentified individual is the only other lay-witness who can contradict, disspell* [sic], *or prove the issues that are in controversy except the government witnesses,* and I don't think this defendant can have a fair trial if the State cloaks him as an unidentified confidential enformant, * * *." (Emphasis added.)

The motion was overruled, "at this * * * particular time during the trial."

A further hearing on the Motion to Disclose was held in chambers during the testimony of Officer McDonald. This was after Officer Bates had testified that the informant accompanied Dobbins and Wandix into the residence at 942 South Taylor. After McDonald was examined in chambers the court ruled finally on the Motion to Disclose. After taking cognizance of defendant's alibi defense, the court overruled the motion, citing *State v. Taylor,* 508 S.W.2d 506 (Mo. App. 1974).

We must conclude from the record that the trial court and the parties recognized that identity was a crucial issue in the case.

We turn then to the essential question whether the informant's identity should have been disclosed to appellant.

In *Roviaro v. United States,* 353 U.S. 53, 59-62 (1957) the United States Supreme Court addressed our question, as follows:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scho v. United States,* 305 U. S. 251, 254; *In re Quarles and Butler,* 158 U. S. 532; *Vogel v. Gruaz,* 110 U. S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
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> * * *
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> "A * * * limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity * * * is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
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> * * *
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> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The *Roviaro* concept was adopted as Missouri law by this Court in *State v. Edwards,* 317 S.W.2d 441 (Mo. banc 1958). *See* also *State v. Yates,* 442 S.W.2d 21 (Mo. 1969); *State v. Nafziger,* 534 S.W.2d 480 (Mo. App. 1969).

In *Roviaro,* the court posited three possible defenses for which the informant's testimony could be vital: entrapment, *mistaken identity of the person* or package, and lack of knowledge of the contents of the package. *Roviaro, supra,* at 64; *Nafziger, supra,* at 482.

The State argues that appellant has failed to show that the testimony of the informant would in fact be exculpatory. The *Roviaro* rule requires disclosure where the informant's testimony "* * * is critical to the issue * * *" or "* * * highly relevant to the issue * * *," *Nafziger, supra,* at 483. The State also argues that disclosure is not necessary where the informant did not participate in the transaction. As the court stated in *Nafziger,* however: "The State's insistence upon the requirement of participation has some support in the literal language of the cases, but an examination of the facts of the cases indicates that participation as it is used in the language of the cases is, in reality, a reference to the presence of the informant at some critical stage of the proceedings so that he is qualified to testify concerning essential facts in the case." *Id.* at 482.

In summary, the rule requires disclosure where the informant was in a position to offer testimony relevant and crucial to the defense; *i.e.* disclosure would not be required if the testimony were on minor or collateral issues or if the testimony would be merely cumulative of that of other

neutral parties. The degree of cruciality necessary to require disclosure must be balanced against the State's need for non-disclosure; *i.e.* possible non-disclosure where the informant is still active in other investigations and the accused's need is minimal.

The crucial issue in the instant case was the identity of the drug seller. It is undisputed that the person who sold the drugs was the person introduced to the undercover officer by the informant. The informant at least observed the officer and the seller enter the house on South Taylor. Whether the informant actually entered the house as well is irrelevant to the question of his ability to testify as to identity; there is no suggestion that anyone else was in the house. The informant was thus in a position to offer highly relevant and material testimony. The appellant's need for the testimony was great. He had alibi witnesses, but there were no other witnesses who could offer direct testimony except for the police officers. In such circumstances of relevancy and need, the State's interest on balance, is weak. This was not an "active" informant who was still being used in ongoing investigations. Although the informant had provided useful and accurate information in other cases, that information was supplied only in the eight months immediately subsequent to the sale at issue. The trial occurred some 21 months after the sale, or 13 months after the informant stopped supplying information. The State's need is minimal. Although the State may have some interest in being able to tell an informant that his identity will never be revealed, even after he is inactive, this interest is not of sufficient magnitude to justify non-disclosure where the informant could provide relevant testimony at trial.

We must conclude that disclosure of the identity of the informant was "essential to a fair determination" on the

facts and issues of this case. The trial court abused its discretion in failing to require disclosure.

The judgment is reversed and the case is remanded for new trial.

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Robert T. Donnelly, Judge

Bardgett, C.J., Seiler and Welliver, JJ., concur; Rendlen, J., dissents in separate dissenting opinion filed; Morgan, J., and Finch, Sr.J., dissent and concur in separate dissenting opinion of Rendlin, J.; Higgins, J., not sitting because not a member of the Court when cause was submitted.

SUPREME COURT OF MISSOURI
en banc

No. 61201

STATE OF MISSOURI,
Respondent,

vs.

VINCENT WANDIX,
Appellant.

DISSENTING OPINION

(Filed October 19, 1979)

For reasons herein set forth I respectfully dissent.

The identity of an informant who is but an observer or minor participant in a criminal transaction need not be disclosed when, as here, no showing is made that the informant's testimony would be other than cumulative or repetitive of the state's evidence. Accordingly, the trial court's refusal to require disclosure was not error and the judgment of conviction should be affirmed.

The essential facts are not complex and though set forth by the majority, are reiterated for ready comparison with the other cases hereinafter discussed. On July 23, 1975, at about 5:30 p.m., Officers Dobbins and Bates of the St. Louis Police Department accompanied an informant, who had been introduced to them by another officer, to a residence in the Beechum Park area. They went to find one Vincent Wandix for the purpose of arranging a heroin purchase and the informant was to introduce Dobbins to defendant Wandix. Locating Wandix without apparent difficulty informant made the introduction stating, "This is a partner of m' ?" and identified Wandix by name.

After the initial conversation Wandix told Dobbins "to follow him" whereupon Dobbins, the informant and Bates (who was picked up en route) followed Wandix as he drove a Cadillac[1] automobile to 952 South Taylor. Bates, playing a backup role, was dropped off near the corner about three houses from the South Taylor residence. According to Dobbins, who was immediately involved at the scene, informant remained in the car and did not enter the house. From Bates' position down the street, it appeared to him that Wandix, the informant and Dobbins entered the 952 South Taylor residence.[2] I believe the variance in the proof as to whether informant went into the house or remained outside is not controlling, for (1) if he remained outside as Dobbins [whose vantage point was considerably better than Bates] described, he was neither a participant in nor an observer of the crime; or (2) if he went inside there is no testimony he was an observer much less a participant and only by way of conjecture or speculation can he be so connected. The direct testimony of Dobbins was to the contrary.

Inside the residence Wandix asked Dobbins what he wanted and Dobbins responded that he "needed two things." Wandix then walked down the hallway, returning in a few minutes with 20-30 capsules in a plastic container from which he removed two capsules and exchanged them with Dobbins for $20.00. Laboratory analysis disclosed the capsules contained heroin.

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1. Dobbins testified that Wandix was driving a 1973 Cadillac convertible with a red top over a white body. Officer Bates described the car as a late model red Cadillac.

2. Police officer Michael McDonald, also involved in the surveillance, testified that driving in a separate car, he followed Dobbins and Bates to Beechum Park and saw them there with the informant. Maintaining this loose surveillance, he later drove to the South Taylor area and saw the three men in their car in the vicinity of the Wandix residence.

Both officers, based on their protracted personal observation of Wandix, made positive in-court identifications.

During trial (three previous proceedings had ended in mistrial) defendant made his unseasonable request that informant's name be disclosed, which I believe was properly refused.

This case is strikingly similar to State v. Tilcock, 522 S.W.2d 60 (Mo. App. 1975). There an informant introduced an illicit drug seller to an undercover police officer in a tavern. The three men retired to a hallway in the rear of the tavern where informant, acting as a lookout, stood five or six feet away from the spot where the officer and the accused bought and sold amphetamine sulfate. On those facts the court of appeals considering the effect of Roviaro v. United States, 353 U.S. 53 (1957), upheld the trial court's denial of defendant's motion for disclosure of the confidential informant because the informant's participation was minor and another witness was present.

Another case remarkably close on its facts is State v. Taylor, 508 S.W.2d 506 (Mo. App. 1974). In *Taylor* the informer went with the police officer into the residence where the transaction occurred and there, as in the case at bar, the *informer was not the sole participant*. Further, there was strong testimony establishing the identity as well as the guilt of defendant. The court of appeals held the trial judge properly denied defendant's request for disclosure of the informant's identity. I believe the carefully reasoned opinions in *Tilcock* and *Taylor* are persuasive and the rationale there expressed should be applied in our case. However, the majority, contrary to *Taylor* and *Tilcock*, would reverse relying on Roviaro v. United States. That reliance, I submit, is misplaced because affirmance here would not be contrary to, but instead consistent with the holding of *Roviaro*. In *Roviaro*, this significant statement appears: "the government's informer was the *sole participant*, other than the accused, in the transaction charged." 353 U.S. at 64. (Emphasis added.) Thus, if Officer Dobbins had not testified and the state had sought to withhold his identity, *Roviaro* would require disclosure as to Dobbins for he was the sole participant.

The test for determining disclosure discussed in *Roviaro* requires a balancing of the public interest in protecting the flow of information against the individual's right to prepare his defense. This determination depends upon such facts as the crime charged, possible defenses, the likely significance of the informer's testimony and other relevant factors. 353 U.S. at 62. It is important that we undertake a detailed examination of that decision.

The *Roviaro* court characterized the right of the state to guard an informant's identity as the informer's privilege or government privilege. As the court explained, 353 U.S. at 59, "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Defendant Roviaro was charged in two counts by a federal grand jury in connection with illicit sale and possession of heroin and the indictment itself (unlike the case at bar) clearly showed the deep involvement of the informer. As stated in the opinion, Count I charged that he sold heroin to one "John Doe" and Count II charged him with fraudulently and knowingly receiving, concealing, buying and facilitating the transportation and concealment after importation of heroin. 353 U.S. at 55. "John Doe" (the informant) was expressly mentioned as the participant to whom the accused made the sale charged in Count

I, and though "John Doe" was not expressly mentioned in the second count, "Doe" was closely tied and implicitly a participant (on behalf of the state) to that charge as well. 353 U.S. at 63.

The controlling facts of *Roviaro* were as follows: The informant met with four police officers and, apparently by prearrangement, one of the officers secreted himself in the trunk of the informant's Cadillac automobile. The informant, alone in the passenger compartment, drove his automobile to a particular location in Chicago. After about one hour's wait, Roviaro (the accused) arrived in a Pontiac automobile and immediately (again apparently by prearrangement) entered the informant's Cadillac taking a front seat beside the informant. Roviaro greeted the informant and directed him where to drive. These two were the only persons in the passenger compartment of the vehicle as they drove a circuitous route to another location in the city. At one point Roviaro admonished informant "to pull over to the curb, cut the motor, and turn out the lights so as to lose a 'tail.'" Roviaro then told the informant to continue "further down." He then asked about money which the informant owed him and advised the informant that he had brought him "three pieces at this time." Shortly thereafter Roviaro ordered the car stopped, alighted, walked a few feet to a nearby tree where he picked up a small package, returned to the open right front door of the Cadillac, made a motion as if depositing a package in the car, then waved to the informant and walked away. As he was doing this, Roviaro said "here it is" and "I will call you in a couple of days." The officer hidden in the trunk then emerged and another who had been following at a distance in another car went to the Cadillac, recovered the package from the floor of the car which contained "three glassine envelopes containing a white powder." The powder was heroin. Roviaro was

arrested at his home and when taken to the police station was confronted by the informant and, significant to the decision, informant denied that he knew or had even seen Roviaro. 353 U.S. at 56-58.

The Court, requiring disclosure, pointed to the following facts, only one of which (*i.e.*, #(4) set forth below) is similar to the case *sub judice*. (1) The indictment, Count I, referred specifically to the sale of heroin to "John Doe" and did so by implication in Count II. (2) So far as Roviaro knew, he and "John Doe" were alone and unobserved during the crucial occurrences for which he was indicted. (3) Most important, "The *government's informer was the sole participant,* other than the accused, in the transaction charged." (Emphasis added.) (4) The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. In our case the informant could add or detract only as to preliminary matters, not the facts of the crime. Thus, even as to this fact the cases are dissimilar. (5) A government witness testified that "Doe" [the informant] denied knowing petitioner or ever having seen him before the confrontation at the police station immediately after the arrest. (6) An additional distinguishing factor appears at page 55 where the court referred to the informer not as a mere police "stool pigeon" but instead "an undercover employee" who took a material part in bringing about the possession of certain drugs by the accused. Three of the police officers described "Doe" as an informer and a "special employee." From this it appears that "Doe" was more than the usual "informant" and had sufficient police connection to bolster defendant's claim that here was a man whose identity should be disclosed.

The Court concluded "that, *under these circumstances* the trial court committed prejudicial error in permitting the government to withhold the identity of its undercover

employee in the face of the repeated demands by the accused for his disclosure." 353 U.S. at 65. (Emphasis added.) From this examination of the salient facts upon which the court based its decision, I do not see how it can be said that *Roviaro* requires reversal in the case at bar. The dispositive facts here stand in stark contrast. Instead, it can be more reasonably stated from the facts and general language of the opinion, that *Roviaro* is authority for denying disclosure and upholding the conviction. Further it should be noted that the court stated, "We believe the *no fixed rule* with respect to disclosure justifiable. The problem is one that calls for balancing of the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend upon the *particular circumstances of each case* taking into consideration the crime charged, the possible defenses, the *possible significance* of the informer's testimony and other relevant factors." 353 U.S. at 62. (Emphasis added.) In that connection the Court referenced several cases wherein several courts of appeals had considered the government's right to withhold the identity of an informer. Among those was Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947), in which the accused was charged with both sale and possession of narcotics. The government agent saw the accused go into a house with the informer after arrangements for a sale had been overheard and the informer later delivered the narcotics to the agents. There, the informer was, as in *Roviaro,* the sole participant. Discussing *Sorrentino,* the court went on to state, "the ninth circuit stated that the accused was entitled to disclosure under these circumstances but the conviction was affirmed on the grounds that 'the record demonstrated that the accused knew the identity of the informer.'" 353 U.S. at 62 n. 12. Obviously, the same is true in the case before

us for it was the informer who arranged the meeting between the police officers and the accused, introduced them to the accused, knew where he could be found and knew his name. Apparently relying on his knowledge of the informant and his relationship with him, Wandix invited Dobbins and the informant to follow him to the Taylor Street residence and there the sale was made.

Finally, in a strongly written dissent which would have denied disclosure of the identity of even the *sole participant* informant in *Roviaro,* Mr. Justice Clark made this statement which history tells us was prophetic and is tragically cogent today. Explaining the decision's destructive effect on the enforcement of the narcotics laws, Justice Clark stated:

> The short of it is that the conviction of a self-confessed dope peddler is reversed because the Government refused to furnish the name of its informant whose identity the undisputed evidence indicated was well known to the peddler. Yet the Court reverses on the ground of 'unfairness' because of the Government's failure to perform this fruitless gesture. In my view this does violence to the common understanding of what is fair and just.

First, it is well to remember that the illegal traffic in narcotic drugs poses a most serious social problem. One need only read the newspapers to gauge its enormity. No crime leads more directly to the commission of other offenses. Moreover, it is a most difficult crime to detect and prove. Because drugs come in small pills or powder and are readily packaged in capsules or glassine containers, they may be easily concealed. They can be carried on the person or even in the body crevasses where detection is almost im-

possible. Enforcement is, therefore, most difficult without the use of 'stool pigeons' or informants.

> Their use has long had the approval of the court. To give them protection governments have always followed a policy of nondisclosure of their identities. Experience teaches that once this policy is relaxed—even though the informant be dead—its effectiveness is destroyed. Once an informant is known the traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal, once visited upon the informer Larunda, has been found obsolete. 353 U.S. at 66-67.

Here, the majority with little mention of the *Roviaro* facts has seized upon a part of the general language in the decision and carried it beyond the contextual limits of the case. It would permit a defendant in any case where an informant was a mere bystander or observer to make the vague conclusory allegation that the informant, who observed facts preliminary to an actual sale of narcotics, might be of help and on such a general allegation disclosure would be required. This it does without requiring that (1) defendant first show the reasonable likelihood that informant's testimony would be of reasonable benefit to him, or (2) there be a showing, as in *Roviaro* that he participated in the commission of the crime.

In short, the mischief resulting from the majority's opinion which unreasonably extrapolates the general language of *Roviaro* would effectively destroy the privilege of the confidential informer in drug cases and require disclosure on the basis of mere speculation that an informant might be able to help the defendant in some way by "amplifying" or denying testimony of the police officer. This would be so, where as here, an informant gives information and merely leads the police officers to a place where

the drug peddler is conducting his business. Such was not the intent of *Roviaro* and constitutes an unwarranted extension of the holding in that case which can only lead to stultification of our law enforcement system by effectively removing one of the state's most valuable enforcement tools, the confidential informant. This radical departure should not be adopted as the law in Missouri and indeed in McCray v. Illinois, 386 U.S. 300 (1967), the Supreme Court reexamining *Roviaro* ten years later made clear that it should not be read broadly to require disclosure of an informant's identity in various procedural stages of criminal prosecutions, that there is no justification for a fixed rule with respect to disclosure and reiterated that in *Roviaro* the informer "was the sole participant other than the accused." *Id.* at 310-311. The *McCray* Court reemphasized that a most important consideration before disclosure would be required was "the possible significance of the informer's testimony." *Id.* Stated otherwise, the trial court need not blindly accept defendant's assertion that the informant's testimony would be helpful. Instead, it must first determine the reasonable likelihood of such "helpful testimony" and thereafter weigh such "fact" in the balance.

Numerous courts have applied the *Roviaro* balancing test to the disclosure issue and have held that the name of an informant, though a minor participant in a criminal transaction and an eyewitness to the transaction in question, need not be disclosed.[3] As hereinabove noted there

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3. Although the great weight of authority since *Roviaro* supports the proposition that the identity of a confidential informant who plays only a minor part in a criminal transaction need not be disclosed, some courts have reached a different result. See People v. Goliday, 8 Cal.3d 771, 778-779, 505 P.2d 537, 106 Cal.Rptr. 113 (Cal. 1973). That decision was based partially on Cal. Evid. Code, § 1041. The Texas Court of Criminal Ap-

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is some question in the evidence whether informant was present when the transaction occurred, but the more plausible testimony demonstrated he was not and that his observations included only the parties' preliminary meeting.[4]

The United States Court of Appeals for the First Circuit recently confronted the disclosure issue on a similar fact pattern in United States v. Estrella, 567 F.2d 1151 (1st Cir. 1977). There, a confidential government informant arranged a sale between an undercover agent and the defendant and was an eyewitness to two final purchases of heroin. The court, rejecting a *Roviaro* based claim stated,

> . . . the informant neither dealt directly with Alicea in any manner [citations omitted], nor was he a *significant participant* in the criminal events. . . . The informant's contribution could at best be marginal [citations omitted] and there is no indication that his testimony would be other than cumulative of that offered by the government's witnesses who were present.

Footnote continued—

peals has held that the identity of an *eyewitness participant* must be disclosed. James v. State, 493 S.W.2d 201, 202 (Tex. Crim. App. 1973). However, *James* has been distinguished on two recent occasions by the same court. Etchieson v. State, 574 S.W.2d 753, 757 (Tex. Crim. App. 1978); Carmouche v. State, 540 S.W.2d 701, 703 (Tex. Crim. App. 1976). In People v. Lewis, 57 Ill.2d 232, 311 N.E.2d 685, 689 (Ill. 1974), the Illinois Supreme Court also held that a defendant has a right to interview a confidential informant who is an eyewitness participant to a drug transaction. These cases are readily distinguishable from that before us because here there has been no showing that informant witnessed the heroin sale.

4. A distinction has been made between participant informants (those who have introduced police officers to the suspect or aided in arranging a sale) and those who merely provide information. State v. McCann, 543 S.W.2d 504 (Mo. App. 1976). "The likelihood that fundamental fairness will require disclosure the identity of the latter group is substantially less." *Id.* at 507. But participation alone is not enough to require disclosure and is but one aspect of the multi-factor analysis required. State v. Taylor, 508 S.W.2d at 512; Roviaro v. United States, 353 U.S. at 62. See State v. Milligan, 71 N.J. 373, 365 A.2d 914, 922 (N.J. 1976).

Id. at 1153. (Emphasis added.) In our case, if we assume informant was present at the final transaction, there is absolutely no evidence suggesting he was a participant much less a significant participant. Moreover, appellant here failed to indicate any "concrete circumstances" that would justify disclosure and failed to offer any evidence indicating the informant's testimony would be other than a reiteration of the state's evidence. 567 F.2d at 1153.

In United States v. Alonzo, 571 F.2d 1384 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 147 (1978), the informant was present when numerous sales of narcotics occurred. The court rejected the contention that failing to disclose the identity of the informant was error stating, "It is well settled that the government is not required to disclose the identity of an informant who is a mere tipster and not an active participant in the offense charged even though he was present during the transaction in question." *Id.* at 1387. *Accord.* United States v. Morris, 568 F.2d 396, 399-400 (5th Cir. 1978); United States v. McGruder, 514 F.2d 1288, 1291 (5th Cir. 1975), *cert. denied,* 423 U.S. 1057 (1976); United States v. D'Amato, 493 F.2d 359, 366 (2d Cir. 1974), *cert. denied,* 419 U.S. 826 (1974). Certainly in this case where it is shown that the informant merely introduced Wandix to the officer and followed him to the house (or may have entered) in which the crime was committed, the trial court did not abuse its discretion in denying the motion for disclosure.

In State v. Milligan, 71 N.J. 373, 365 A.2d 914 (N.J. 1976), the New Jersey Supreme Court recently dealt with the disclosure issue under facts nearly identical to ours. An informant accompanied a police officer to a street corner location where he introduced the officer to defen-

dant and observed as a sale was arranged. Subsequently all three drove to the defendant's house and while the informant was out of the room, the sale was made. The New Jersey Supreme Court concluded that given the informer's limited involvement in the crime and the speculative significance of the testimony, the defendant did not demonstrate that his interests outweighed the state's interest in nondisclosure. There, as here, the informant's role was minor and the significance of his possible testimony a matter of conjecture.

Similarly, the Colorado Supreme Court in People v. Marquez, 190 Colo. 255, 546 P.2d 482 (Colo. 1976) ruled against disclosure on a case involving an anonymous informant who arranged a meeting of an undercover officer and a seller of heroin. The informant and the officer went to the seller's house where the informant introduced him to the officer. Next, informant asked the seller whether he had the heroin. The seller replied affirmatively and handed a red balloon filled with heroin to the informant who in turn handed it to the officer who paid for the drug. On those facts, the Colorado Supreme Court upheld the ruling of the trial court denying disclosure. Clearly, the informant's involvement in our case was minimal compared to that of the informer in *Marquez.*

Iowa, in State v. Sheffey, 243 N.W.2d 555, 559-560 (Iowa 1976), faced a similar fact pattern in which a confidential informant introduced an undercover police officer to a seller of amphetamines and was present when a sale took place. The officer and informant then departed. The Iowa court, reasoning that the seller could reasonably be deemed to know the informant and that the seller made no more than a speculative showing that the informant's testimony would have been helpful, held the denial of disclosure proper.

It is generally recognized that defendant has a significant burden of proving that the disclosure of a confidential informant is necessary for a fair determination of defendant's case and that the need outweighs the government's interests. Mere speculation on the defendant's part that the testimony of the confidential informant will be helpful is not enough. In re United States, 565 F.2d 19, 23 (2d Cir. 1977), *cert. denied,* 98 S. Ct. 3082 (1970); United States v. Marshall, 532 F.2d 1279, 1282 (9th Cir. 1976); United States v. Alvarez, 472 F.2d 111, 113 (9th Cir. 1973), *cert. denied,* 412 U.S. 921 (1973); United States v. Skeen, 449 F.2d 1066, 1070 (D.C. Cir. 1971). In the case at bar, defendant has offered only his conclusory assertion (belatedly made by his oral motion during trial) that the informant's testimony might be helpful. This may legitimately be characterized as speculation and conjecture hardly sufficient to meet the significant burden described in the flood of cases interpreting *Roviaro.* In sum, it strains credulity to believe that the informant would offer any testimony helpful to appellant's cause. From the evidence, it is clear that informant and defendant knew one another. Informant knew Wandix by name, knew his business and where to find him. It is equally apparent that Wandix knew informant because solely on the informant's word he was willing to accept a new acquaintance (Dobbins) and take him to his (Wandix) home and there to deal in heroin. How can we give unquestioned credence to the defendant's contention that he did not know the informant or claim the state "cloaked" him from defendant?[5] If we somehow assume defendant did

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5. During the testimony the first day of the fourth trial of this cause the following occurred:

MR. SCHWARTZ: [defense counsel] At this time, Judge we make an oral Motion and request that the State disclose the name and address of this so-called individual that was present during the course of this incident for the reason that

(Continued on following page)

not know his name, this fact does not change the compelling inference that defendant knew the man and thus dilute his counsel's belated claim that, "I don't know who he is. . . ." Also, there is little or no likelihood that defendant could have obtained beneficial testimony from the informant. This, coupled with the fact two police officers positively identified Vincent Wandix and one of them testified directly on the commission of the crime is also supportive of the court's refusal to sustain defendant's request for disclosure. See United States v. Soles, 482 F.2d 105, 109 (2d Cir. 1973), *cert. denied,* 414 U.S. 1027 (1973); United States v. Davis, 487 F.2d 1249, 1251 (5th Cir. 1973); United States v. Russ, 362 F.2d 843, 845 (2d Cir. 1966), *cert. denied,* 385 U.S. 923 (1967).

I would hold that when a confidential informant is a minor participant in a transaction and the defendant makes no showing that the informant's testimony would be other than cumulative and repetitive of the state's evidence, the trial judge does not abuse his discretion in

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Footnote continued—

> I don't think he qualifies as Mr. Nangle would have the court, or ask the Court to believe as being a confidential informant. He's equally a participant in the alleged offense as any other police officer that was there. He was present when this was supposed to have taken place. He's identified my client to the Police Officer, and indicated to him that he was Vincent Wandix, and I think that in fact he is the only other lay-witness to this case, that would be available to either side. I don't know who he is, but he is or has a part in this matter in this issue or controversy in dispute. There is alibi defense pleadings in this case; there are alibi witnesses that have been endorsed, and this unidentified individual is the only other lay-witness who can contradict, disspel, or prove the issues that are in controversy except the government witnesses, and I don't think this defendant can have a fair trial if the State cloakes [sic] him as an unidentified confidential informant, and doesn't let us try to ascertain what his testimony would be—if it would help this defendant, and help Mr. Wandix in counteracting any of the evidence in this case. And I think they are cloaking him as a confidential informant without some other information.

denying disclosure. State v. Redding, 357 S.W.2d 103, 108 (Mo. 1962); State v. Edwards, 317 S.W.2d 441, 447 (Mo. 1958). For these reasons, the judgment of the trial court should be affirmed.

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Albert L. Rendlen, Judge

APPENDIX C

IN THE
SUPREME COURT OF MISSOURI

No. 61201

STATE OF MISSOURI,
Respondent,

v.

VINCENT WANDIX,
Appellant.

MOTION FOR REHEARING

(Filed November 2, 1979)

The State of Missouri, respondent herein, by Attorney General John Ashcroft, respectfully requests that this Court rehear and reconsider its October 19, 1979, Opinion in this case because it misinterprets, misquotes, and misunderstands material matters of law and also fails to correctly ascertain the pertinent facts. Rule 84.17.

Suggestions

In its October 19, 1979, Opinion reversing the appellant's conviction for the sale of heroin this Court announced a rule of law so unique and so out of the main stream of any previous judicial opinion that it is forced to principally rely on a single Missouri Court of Appeals decision.

Stated briefly, this Court concluded that Judge Stussie prejudicially erred in failing to order the disclosure of an informant *solely* because that informant introduced police officers, posed as drug purchasers, to the appellant. Apparently, because the weight of evidence supports the conclusion that only a police officer and the appellant were present at the drug sale, this Court concluded that the informant's nonparticipation in the actual crime is irrelevant. This Court found that the identity of the informant had to be disclosed because his introduction of police officers to the appellant placed him "in a position to offer testimony relevant and crucial to the defense . . . ."

What is interesting about this conclusion is that it purports to be based upon *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623 (1957). While the United States Supreme Court did state that no fixed rule with respect to disclosure was justifiable, and fundamental requirements of fairness require disclosure of an informer's identity where it is *relevant and helpful to the defense of an accused,* these words become meaningful and lend guidance only when viewed in light of subsequent statements made by the Court in *Roviaro*:

> The circumstances of this case demonstrate that John Doe's *possible testimony was highly relevant and might have been helpful to the defense.* So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his *one material witness.* Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence *and* had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. *He was the only witness who*

might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplyify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment.

> This is a case where the Government's informer was *the sole participant,* other than the accused, in the transaction charged. The informer was the *only witness* in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, *under these circumstances,* the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure. [Emphasis added]. *Roviaro,* 77 S.Ct. at 629-630.

Obviously, this Court's statement that the mere introduction of a police officer to a defendant, by an informant, establishes sufficient crucial relevance to mandate disclosure when the defendant claims mistaken identity, is unsupported by any statement in *Roviaro.* This Court found that

the informant in the instant case was the only witness "who could offer direct testimony except for the police officers." But this is not the criterion announced in *Roviaro.* The United States Supreme Court required disclosure of an informant who was the *only material witness.* The United States Supreme Court found that Roviaro's ability to cross-examine police officers was insufficient since they were not involved in the drug transaction, i.e., the crime, itself. What the United States Supreme Court did say is that when an informant is the *only witness* to the crime the probability of his relevance becomes substantial and, when viewed in light of the totality of circumstances in the case, may require disclosure.

The appellant was not on trial for promising to sell heroin to undercover police officers or for discussing the possibility of such a sale with them, the appellant was on trial for *selling* a controlled substance. If the informant is unable to testify as to the *elements* of that crime his relevance is wholly insufficient to mandate disclosure. Apparently, this Court does not believe the foregoing statement to be a correct summary of the law. However, that this Court is wrong, and not the respondent, is augured by the fact that the respondent in its brief, and the Dissent list innumerable cases supporting their position while the Majority relies on a single Missouri Court of Appeals decision.

In discussing Roviaro's need for disclosure the United States Supreme Court had to engage in a determination of "[t]he materiality of John Doe's possible testimony . . . ." *Roviaro,* 77 S.Ct. at 629. The Court concluded that the informant's testimony was not only highly relevant but might be helpful because the informant was the *only witness* to the actual crime *and* because the informant had stated, when confronted with Roviaro's presence, that he

did not know Roviaro and had never met him previously. The informant in *Roviaro* was the only one who might have testified favorably to him. Interestingly, this Court has nothing to say about the respondent's cite to *United States v. Marshall*, 532 F.2d 1279, 1282[3] (9th Cir. 1976), wherein that Court stated:

> However, '[m]ere speculation that the informer might possibly be of some assistance is not sufficient to overcome the public interest and the protection of the informer.' *Lannom v. United States*, 381 F.2d 858, 861 (9th Cir. 1967). Our decisions have placed the burden of proof upon the defendant to show the need for disclosure [citations omitted]. . . .
>
> Here, Marshall made no such showing for disclosure of the informers which would outweigh the government's interest in protecting them as sources of information. Marshall merely speculated that disclosure would be beneficial to his defense. Such speculation was not sufficient to require disclosure.

See also, United States v. Soles, 482 F.2d 105 (2nd Cir. 1973); and, *United States v. Davis*, 487 F.2d 1349 (5th Cir. 1973). In *United States v. Skeens*, 449 F.2d 1066 (D.C.Cir. 1971). Skeens was convicted of two counts of assault with a dangerous weapon and one count of robbery. Skeens contended that he was entitled to the name of the Government's informant under the rule announced by the United States Supreme Court in *Roviaro*. The Court of Appeals found that the record showed only that the informant contacted the police some three weeks after the crime and told them of the source and whereabouts of the shotgun involved in the robbery and an alleged conspiracy to murder the Government's principal witness. The Federal Court of Appeals further found that the record was otherwise silent as to the participation of the informant in the

offense itself. It is of the utmost importance to note that in the instant case the record is equally silent as to the participation of the "unidentified individual" in the actual transaction involving Officer Dobbins and the seller of the heroin. The Court of Appeals in *Skeens* noted that the Government presented its case without mention of the informant, and stated:

> We are thus not, as in *Roviaro*, dealing with one with whom the accused was charged to have been dealing in the commission of the offense. Unlike *Roviaro*, nothing in this record establishes that the informant was a participant, an eyewitness, or a person who was otherwise in a position to give direct testimony concerning the crime. None of the criteria of *Roviaro* are present. [Citation omitted]. In sum, all the evidence discloses is that 'the informer was an informer and nothing more.' [Citation omitted]. *Id.* at 1070.

The appellant's attorney requested the identity of the informant alleging, in conclusory terms only, that he was a material witness and "some kind of a participant in this incident." (Tr. 33). Never does the appellant's counsel state that he believes the informant is in possession of possibly beneficial testimony. In fact, it is evident that the appellant's counsel was quite aware that the informant had no beneficial testimony to offer.

The instant case was instituted by the filing of an indictment against the appellant on March 16, 1976 (Tr. 1). On January 5, 1977, trial of the appellant began (Tr. 3). On January 6, 1977, *after* the state had presented *all of its evidence*, and during the appellant's case in chief, his motion for a mistrial was granted (Tr. 4). At the beginning of the subsequent trial held on April 11, 1977, the trial court asked the appellant's attorney if he needed anything

further, by way of information, from the state (Tr. 12). In responding to that question the appellant's attorney stated, in material part, as follows:

> . . . Having tried this case before, some three times prior to that, the evidence will be the same as it was the past, and I don't have, I haven't been made aware of any new evidence they have found or any new witnesses they claim they are now going to use in this case. . . . . (Tr. 12).

Additionally, and equally crucial, is the fact that the prosecuting attorney wanted to introduce into evidence the fact that on October 18, 1976, the appellant *admitted* that on July 23, 1975, "he sold what he thought was powdered substance to undercover agents . . . ." although "he said that [it was] a rip off . . . ." (Tr. 217). Although the appellant attacked the admissibility of this evidence, and it was excluded, the attacks were at no time based upon its reliability or veracity or that the statement made by the appellant was involuntary, coerced or otherwise illegal.

There can be no question about it, the appellant's attorney injected the disclosure issue into trial in the hope of getting this case reversed if his client was convicted. This is exactly what has happened. This Court has determined to let this case go to trial a fifth time because a clever lawyer asked for the disclosure of an informant he knew had nothing beneficial to testify to and therefore did not even attempt to sustain his burden of establishing the possibility of beneficial testimony.

In response to the argument that the appellant failed to show that the testimony of the informant would be exculpatory, this Court stated:

> The *Roviaro* rule requires disclosure where the informant's testimony '. . . is critical to the issue . . .' or '. . . highly relevant to the issue . . . .'

This Court's non-sequitur answer does not meet the respondent's argument. *Roviaro* established not only that an informant's testimony must be highly relevant but that in addition thereto, there must be come possibility of its being exculpatory. What is the sense of disclosing the identity of an informant, even if he has highly relevant testimony, if there is not the slightest chance it will be exculpatory, and the defendant knows that. What is the justice and fairness in ordering a fifth trial, disclosing the informant's identity, and having the appellant's attorney throw that information in the garbage full well realizing its worthlessness.

The Dissent was correct it concluded that the identity of an informant need not be disclosed when no showing is made that his testimony would be other than cumulative or repetitive of the State's evidence. However, quite unlike the majority opinion, the Dissent's statement of the applicable rule is buttressed by innumerable case citation. The Dissent noted that ten years after *Roviaro* the United States Supreme Court reaffirmed that case in *McCray v. Illinois*, 386 U.S. 300 (1967) wherein the Court stated not only that *Roviaro* should not be read broadly but that a most important consideration before disclosure would be required was "the possible significance of the informer's testimony." In *United States v. Estrella*, 567 F.2d 1151 (1st Cir. 1977), the Court concluded that the identity of an informant need not be disclosed where his participation did not amount to more than merely arranging a sale between undercover police and the defendant. See also, *United States v. Alonzo*, 571 F.2d 1384 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 147 (1978); *United States v. Morris*, 568 F.2d 396 (5th Cir. 1978); *United States v. McGruder*, 514 F.2d 1288 (5th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976); *United States v. D'Amato*, 493 F.2d 359 (2nd Cir. 1974), *cert. denied*, 419 U.S. 826 (1974). In *State v. Milligan*, 71 N.J.

373, 365 A.2d 914 (1976) the New Jersey Supreme Court in a case virtually identical factually to the instant one concluded that an informant's identity need not be disclosed because his role was minor and the signifance of his possible testimony a matter of conjecture. Similarly, the Colorado Supreme Court in *People v. Marquez,* 190 Colo. 255, 546 P.2d 482 (banc 1976) ruled against disclosure in a case involving an anonymous informant who arranged a meeting between an undercover officer and a seller of heroin. The informant and the officer went to the seller's house where an informant introduced him to the officer. Next, the informant asked the seller whether he had the heroin. The seller replied affirmatively and handed a red balloon filled with heroin to the informant who in turn handed it to the officer who paid for the drug. On those facts, the Colorado Supreme Court upheld the ruling of the trial court denying disclosure. Clearly, the informant's participation in the instant case was far more minimal compared to that of the informer in the *Marquez.* See also, *State v. Sheffey,* 243 N.W.2d 555 (Iowa 1976).

Dispositively, this Court's Opinion cites no cases countering the well-established law that mere speculation on a defendant's part that the testimony of a confidential informant will be helpful is, of itself, not enough to require disclosure. *In re United States,* 565 F.2d 19 (2nd Cir. 1977), *cert. denied, sub nomine, Bell v. Socialist Workers Party,* 98 S.Ct. 3082 (1978); *United States v. Marshall,* 532 F.2d 1279 (9th Cir. 1976); *United States v. Alverez,* 472 F.2d 111 (9th Cir. 1973), *cert. denied,* 412 U.S. 921 (1973); *United States v. Skeen,* 449 F.2d 1066 (D.C.Cir. 1971).

There is no question but that the appellant's counsel was sandbagging. By his own omission he had tried this case three times previously. He certainly knew the facts of the case inside and out and the fact that he failed to

sustain his burden and establish that the informant had testimony beneficial to the appellant is more than enough to support Judge Stussie's decision not to require disclosure. However, that fact more dispositive of this Court's misinterpretation and misapplication of *Roviaro* is that it simply cites no cases directly in support of its position, while the respondent and the Dissent cited innumerable cases reflecting and expounding upon the nature and meaning of *Roviaro.* Those cases support Judge Stussie's ruling.

Next, this Court concluded that the State's need to prevent disclosure was weak. That conclusion is founded solely upon the fact that the informant, although active for eight months after the criminal transaction, was not active at the time of the appellant's trial. This conclusion misses the point. In *Roviaro* the United States Supreme Court stated the policy behind denying disclosure of an informant's identity:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. *Roviaro v. United States, supra,* 353 U.S. at 59.

The United States Supreme Court said nothing about whether an informant was still active or not. The question is whether the disclosure of the informant's identity, in this situation, would deter that informant from once again

fulfilling his obligation to disclose information about criminal activity. The United States Supreme Court says nothing about an informant continuing actively in such a role. Rather, the issue is whether disclosure of his identity will deter him from fulfilling his obligation to report lawlessness in the future and whether that disclosure will deter the community in general from fulfilling its obligation to report crimes to the government. The community's needs cannot be outweighed by the needs of a defendant which are speculative or, in reality, nonexistent. That is the reason a defendant must establish, with specificity, that the testimony of an informant whose disclosure he requests will benefit him; otherwise, the community suffers at the hands of an obviously guilty defendant who has nothing to gain and a system to destroy.

The travesty here is that this Court has determined that the appellant will not be a recipient of fundamental fairness unless he is tried for a fifth time.

This Court's ruling will effectively limit prosecutions and convictions in the controlled substances area. According to this Court all a defendant has to do is make a motion requesting the disclosure of an informant, without establishing anything in regard to a specified need or probable beneficial testimony of that informant. If that informant is not presently active the State's interest will be deemed so minimal as to require a disclosure and an obvious continuance in the case while the defendant seeks the individual and determines whether to call him as a witness. The end result will be that we will have no informants; the obvious consequence being that prosecutions and convictions of those engaged in drug trafficking will dramatically decrease. This result is not what the United States Supreme Court intended in *Roviaro*.

This assertion is not speculation. The undersigned has been in contact with Craig Ellis, an Assistant Prosecuting

Attorney for St. Louis County. Mr. Ellis informed the undersigned that he recently dropped charges in *State v. Paul Kevin Umphress,* No. 420381, St. Louis County Circuit Court, Division 3. Umphress was charged with the sale of a Schedule One Controlled Substance. Umphress requested disclosure of an informant's identity, even though the informant played a minor role in the case and Umphress at no time stated he would rely on the alibi of mistaken identity. Mr. Ellis consulted with police officials and determined that under no circumstances could the informant's name be disclosed. The charges against Umphress were dismissed because it is the feeling of prosecutors and judges alike, in St. Louis, that *Wandix* ennunciates a *per se* rule of disclosure. Since it is deemed that identity is always an issue in drug cases, and *Wandix* requires disclosure of an informant who merely arranges a drug sale, St. Louis judges are now requiring disclosure in virtually all cases in which it is requested. Since the *Wandix* Opinion came down two weeks ago all defense attorneys are filing disclosure requests knowing full well that *Wandix* will require disclosure if they claim mistaken identity and the informant merely introduced undercover police to their clients. The end result is that a large number of pending prosecutions in St. Louis will be dismissed.

Unless this Court recognizes that an informant's disclosure is mandated in only specified instances such as in *Roviaro*, then drug peddling will flourish. Although this is the result of *Wandix* it was not the intent of *Roviaro*. As stated by the United States Supreme Court in *McCray v. Illinois, supra*:

> . . . we have taken occasion to point out that a rule virtually prohibiting the use of informers would 'severely hamper the government' in enforcement of the narcotics laws. [Citation omitted]. *Id.*, 386 U.S. at 312, 87 S.Ct. at 1063.

This Court's unwarranted expansion of *Roviaro* has established a rule which this day is virtually prohibiting the use of informers. This liberal expansion of *Roviaro* is not only dangerous but unconstitutional. *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219 [1, 2] (1975).

EN FIN, in light of all the foregoing, the respondent's brief and the Dissent, it is respectfully request that this Court reconsider its Opinion and affirm the conviction below.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing was mailed postage prepaid, this 2nd of November, 1979, to:

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APPENDIX D

SUPREME COURT OF MISSOURI
EN BANC

No. 61201

STATE OF MISSOURI,
Respondent,

vs.

VINCENT WANDIX,
Appellant.

(Filed November 14, 1979)

PER CURIAM:

In asserting the principal opinion "would effectively destroy the privilege of the confidential informer in drug cases" and "can only lead to stultification of our law enforcement system by effectively removing one of the state's most valuable enforcement tools, the confidential informant," the dissent misinterprets the language of the principal opinion and overstates its intended effect.

The principal opinion does not presume to declare *new* law as to *the informer's privilege*. It represents at most an application of the *Roviaro* balancing test, adopted by this Court in State v. Edwards, 317 S.W.2d 441 (Mo. banc 1958), to a rather unique fact situation. *The informer's privilege* remains intact as reflecting the strong public policy of this state, and should be honored except in those cases where there exists "the possibility of any real and substantial prejudice to the defendant, in the bona fide preparation of his case, from a failure to divulge the name."

Edwards, 317 S.W.2d at 449 (Eager, J., concurring and speaking for a plurality).

The state's motion for rehearing is overruled.

Bardgett, C.J., Donnelly, Seiler and Welliver, JJ., concur;

Rendlen, Morgan, JJ., and Finch, Sr.J., dissent.